United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

76-1513

To be argued by Howard Weintraub

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,
Appellee

v.

JOSEPH A. LOMBARDO, DONALD A. DiCARLO,
RICHARD KELSEY, EDWARD A. OWCZARZAK,
Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES

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ISSUES PRESENTED

I. Whether the affidavit in support of the application to wiretap adequately demonstrated the inadequacy of conventional investigative techiniques (Lombardo at 5-11; Kelsey at 5-11; DiCarlo at 11-18).[1/]

II. Whether the court erred in seating two jurors and whether appellants were prejudiced by the dismissal of these jurors for cause during trial (Lombardo at 12-17; Kelsey at 12-17; DiCarlo at 4-11).

1/ Designation to the briefs and appendicies filed by appellants are by the name of the appellant followed by the appropriate page numbers of the brief or appendix. "Kelsey" refers to the joint brief and appendix filed by appellants Kelsey and Owczarzak.

III. Whether the court properly imposed consecutive terms of imprisonment on appellant Lombardo for conspiring to conduct a gambling business and the substantive offense of conducting the gambling business (Lombardo at 18-21).

IV. Whether Judge Elfvin erred in refusing to recuse himself because of his former involvement as United States Attorney in two prior unrelated prosecutions of appellant Lombardo (Lombardo at 22-27).

STATUTES INVOLVED

18 U.S.C. 1955 provides in pertinent part:

> (a) Whoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business shall be fined not more than $20,000 or imprisoned not more than five years, or both.
>
> (b) As used in this section --
>
> (1) "illegal gambling business" means a gambling business which --
>
> (i) is a violation of the law of a State or political subdivision in which it is conducted;
>
> (ii) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and
>
> (iii) has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of $2,000 in any single day.

* * * *

18 U.S.C. 2232 provides:

> Whoever, before, during, or after seizure of any property by any person authorized to make searches and seizures, in order to prevent the seizure or securing of any goods, wares, or merchandise by such person, staves, breaks, throws overboard, destroys, or removes the same, shall be fined not more than $2,000 or imprisoned not more than one year, or both.

18 U.S.C. 2518(1)(c) provides:

> (1) Each application for an order authorizing or approving the interception of a wire or oral communication shall be made in writing upon oath or affirmation to a judge of competent jurisdiction and shall state the applicant's authority to make such application. Each application shall include the following information:
>
> * * *
>
> (c) a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous;

28 U.S.C. 455 provides in pertinent part:

> (a) Any justice, judge, magistrate, or referee in bankruptcy of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.
> (b) He shall also disqualify himself in the following circumstances:
>
> * * *
>
> (2) Where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;
>
> * * *
>
> (4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;
>
> * * *
>
> (d) For the purposes of this section the following words or phrases shall have the meaning indicated:
> (1) "proceeding" includes pretrial, trial, appellate review, or other stages of litigation;
>
> * * * *

STATEMENT

Following a jury trial in the United States District Court for the Western District of New York, appellants were convicted of conspiring to conduct and conducting a gambling business, in violation of 18 U.S.C. 371 and 1955 (Counts 1 and 2). Appellant Joseph A. Lombardo was also convicted of the destruction of property in order to prevent its seizure by F.B.I. agents, in violation of 18 U.S.C. 2232 (Count 3). Appellants Richard Kelsey and Edward A. Owczarzak were both sentenced to concurrent terms of one year imprisonment on Counts 1 and 2. Appellant Donald A. DiCarlo was sentenced to one year imprisonment on Count 1, to be followed by three years of probation on Count 2, and fined $5,000. Appellant Lombardo was sentenced to consecutive terms of two years' imprisonment on Counts 1 and 2 and a consecutive term of one year imprisonment on Count 3, and ordered to pay a fine of $20,000 as a condition of two years of probation also imposed on Count 2. 2/

2/ Codefendant Jack M. Silverstein was also convicted of Counts 1 and 2. He was sentenced to concurrent terms of three years' probation and payment of a $1,000 fine. He did not appeal from his convictions.

The evidence at trial, which consisted primarily of tape recordings and composite transcripts of 205 telephone calls (Gov. Exs. 73-77),[3/] as well as the testimony of an expert who analyzed the recorded conversations (Tr. 742-776, 955-963, 973-974, 1655-1657, 1669-1672, 1714-1738, 1773-1898), is not challenged here. It established that from September, 1975 through December, 1975, appellants, codefendant Silverstein, and at least ten other unindicted individuals conducted a gambling business at four different locations in the Buffalo, New York area, which accepted wagers on sporting events.

In brief, the evidence showed that the gambling operation grossed $340,662 in wagers during a twenty-two day period (November 1, 1975 through December 11, 1975), with an excess of $2,000 on each of those days (Gov. App. 86-90; see Tr. 1490-1496, Gov. Ex. 74 at 135-138). This evidence suggested that Lombardo was the owner/manager of the business, which serviced in excess of 100 bettors. He made policy decisions, settled disputes, oversaw the collection and payoffs of accounts, authorized acceptance of new accounts and decided what "line information"[4/] would be given

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3/ The calls were from approximately 2,404 telephone calls that were intercepted between October 31, 1975 and November 19, 1975, and December 1, 1975 through December 11, 1975, as a result of court-approved monitoring of telephones utilized in the gambling operation. Approximately 999 of these telephone calls were made for the purposes of placing and accepting gambling wagers. About 1187 were made for the purposes of obtaining wagering information and settling of accounts from previous betting. Approximately 131 calls regarding the operation of the gambling business were intercepted. (Addendum to brief at A1-A3).

4/ "Line information" is "the points that are added to the underdog [team's] score or substracted from the favorite [team's] score to more evenly match the teams for the purpose of wagering" (Tr. 1736).

to the bettors (Tr. 1488-1490, 1503, 1617-1618, 1621-1622, 1635-1636, 1722, 1727-1728, 1788-1789, 1797, 1889). Kelsey was also in a managerial position. He would contact Lombardo and accept instructions and line information from him for dissemination to the other appellants. He assisted Lombardo in locating a line source, adjusting the line, and calculating the money due on accounts. He also arranged for the collection of at least one account, acted as a "writer"[5/] of wagers, and provided line information to bettors (Tr. 1442-1447, 1451-1455, 1730, 1787-1791, 1798-1800, 1890). Owczarzak, DiCarlo, and codefendant Silverstein provided line information and accepted wagers over telephones, for relay to Kelsey (Tr. 1071-1077, 1082-1088, 1729-1731, 1797-1799, 1804-1815, 1876-1882).

The expert witness for the government concluded that six accounts in the records of the gambling operation represented "writers" for the operation and that two more accounts represented bookmakers who supplied and received line information[6/] (Tr. 1480-1484, 1723, 1725-1726, 1731-1734, 1791-1792, 1875-1876). Further-

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5/ "A writer" is "an individual who accepts wagers from an account and relays these wagers into a gambling organization * * *" (Tr. 1732).

6/ One writer controlled approximately eleven accounts and another writer was shown to have received a commission for the amount of wagers he accepted (Tr. 1732-1733). One of these bookmakers also engaged in "layoff" wagers, which is the "rebetting of wagers from one bookmaker with another[,] [and] is a means which a bookmaker uses to balance his books" (Tr. 1734-1736). See United States v. Becker, 461 F.2d 230, 233 (2nd Cir. 1972), vacated and remanded on other grounds, 417 U.S. 903.

more, at least one of the bettors testified that two different individuals, not present in the courtroom, had met with him on three occasions -- on appellant DiCarlo's instructions to collect money owed the gambling operation (Tr. 1445-1446, 1608-1609).

In addition to the recorded conversations of appellants which clearly demonstrated that each was engaged in conducting the gambling operation,[7/] each appellant also made unrecorded incriminating statements. When Susan Jenkins (whose apartment was utilized during November, 1975 by DiCarlo and Owczarzak for acceptance of wagers over telephones) asked what would happen if she didn't let DiCarlo use her apartment, appellant DiCarlo responded that "he would lose a lot of money, he would have to get in no matter what[,] [because] he could possibly lose thousands of dollars * * * *" (Tr. 1087-1088). Both Owczarzak and DiCarlo also informed Mrs. Jenkins that they had other people accepting bets at locations besides her apartment (Tr. 1088). Furthermore, following his arrest on December 20, 1975, Kelsey informed an F.B.I. agent that "he did keep bookmaking records on flash paper" (Tr. 1290-1291). Lombardo also inquired of an agent after his arrest on that date, "'Why are you guys picking on me when there are others doing the same stuff and nothing happens to them?'"(Tr. 1324).[8/]

7/ See, e.g., Gov. Ex. 73 at 1-12, 27-43, 52-60, 84-94; Gov. Ex. 74 at 154-159, 166-189, 192-205, 208-230, 238-250; Gov. Ex. 75 at 336-339, 381-411; Gov. Ex. 76 at 459-467, 473-488, 493-509, 529-539; Gov. Ex. 77 at 563-568, 647-650.

8/ Similarly, following the arrest of codefendant Silverstein on December 20, 1975, he asked an agent why he was being arrested "as he was only answering the phone and writing" (Tr. 1330).

Visual surveillances of appellants from August, 1975 through December, 1975 also showed their presence at the four different locations utilized by the illegal gambling business, and the presence of Lombardo, Kelsey, and Owczarzak at various meetings (Tr. 11-60, 209-220, 253-283, 285-324, 362-379, 432-436, 440-442, 472-505, 529-539, 622-631) (Ct. Ex. 1B). Moreover, searches on December 20, 1975 uncovered, inter-alia, sheets of papers with names and code descriptions similar to those used in the intercepted conversations and sheets of "flash" paper[9/] at Lombardo's residence (Tr. 978, 980, 1746-1748, 1753) (Gov. Exs. 141-142, 218); a hand-written record on flash paper which listed some seventy different bettor accounts and a running total of money next to each account at Kelsey's residence (Tr. 1197, 1751, 1753) (Gov. Ex. 223); and sporting news schedules for college and professional football and basketball games listing the teams and times for when the games would be played on Owczarzak's person, at his residence, on Lombardo's person, and in one of his cars (Tr. 1188-1189, 1231, 1276, 1311-1312, 1356-1358, 1744-1745) (Gov. Exs. 133-138, 149).

The record in this case also shows that just prior to his arrest, Lombardo purposefully ignited in his car what was later determined to be flash paper, after an F.B.I. agent, who had a warrant to conduct searches of Lombardo and the vehicle, had announced his identity and informed Lombardo that he was under arrest (Tr. 1206-1207, 1331-1339, 1350-1355, 1362-1363, 1394-1396, 1426-1427) (Gov. Ex. 119).

9/ This type of paper is commonly used in bookmaking operations "for the simple reason that it is easily destroyed, and any records that are kept thereon are irretrievable" (Tr. 1752).

ARGUMENT

I.

THE AFFIDAVIT IN SUPPORT OF A WIRE INTERCEPTION APPLICATION DEMONSTRATED THE INADEQUACY OF CONVENTIONAL INVESTIGATIVE TECHNIQUES

Appellants contend that their telephone conversations should have been suppressed because the affidavit in support of the interception application of October 31, 1977 [10/] failed to establish that other investigative techniques had been inadequate or were unlikely to succeed (Lombardo at 5-11, Kelsey at 5-11, DiCarlo at 11-18). We submit, contrary to appellants' contention, that the affidavit of F.B.I. Agent John C. Poerstel in support of the wiretap application (Gov. App. 6-37) gave a detailed accounting of the procedures that were employed in investigating the gambling operation and a statement explaining why those measures were insufficient to gain the necessary evidence to successfully prosecute the participants and to discover the full scope of the

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10/ On October 31, 1975, Judge Elfvin authorized the interception of wire communications for a twenty-day period over two telephone facilities located at Apt. 6, 291 Palmdale Drive, Amherst, New York (Gov. App. 1-5), and the installation of pen registers on those telephones. On December 1, 1975, Judge Elfvin authorized the interception of wire communications for a twenty-day period over those same telephones, and two telephones located at Apt. B, 3 Windham Court, Amherst, New York, and the installation of pen registers on the four telephones. On December 12, 1975, the Court also authorized the installation of pen registers on two telephone facilities located at a third location, Apt. 4, Building F, 4285 Chestnut Ridge, Amherst, New York. Although appellants do not contest the sufficiency of the later affidavits, any evidence derived from those interceptions would be excludable if the original application was invalid. However, as we show below, such is not the case.

operation. It also stated why other untried procedures were unlikely to succeed. This satisfied the requirement of 18 U.S.C. 2518(1)(c) that each application for an order authorizing the interception of wire or oral communications shall include, inter alia:

> a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous[.]

In the affidavit involved here, the agents met this standard by "inform[ing] the authorizing judicial officer of the nature and progress of the investigation and of the difficulties inherent in the use of normal law enforcement methods." United States v. Hinton, 543 F.2d 1002, 1011 (2nd Cir. 1976), cert. den., sub nom., Bates v. United States, No. 76-5823, January 17, 1977. The affidavit included the following information:

> (1) A detailed account of the gambling operation derived from two confidential sources (Gov. App. 8-16).
>
> (2) The informants' indication that they would not testify (Id. at 33).
>
> (3) Physical surveillances of the premise suspected to be the site of the operation and of some of the appellants' movements during a three-month period were unproductive (Id. at 17-26).
>
> (4) Physical surveillance was of limited value because the location of the operation was "in an open area completely surrounded on all sides by open parking areas and fields * * * [thus making it] extremely difficult to maintain * * * [a] continuous moving or stationary surveillance in the vicinity * * * for any extended period of time without the surveillance [a]gents being observed" (Id. at 34).
>
> (5) Physical surveillance was also difficult because of the "surveillance consciousness" and cautious manner

in which two of the known participants were observed to act in their arrival and departure from 291 Palmdale Drive (Id. at 20-22, 31, 34).

(6) Conventional searches and seizures would probably not produce evidence on which to base a conviction because past experience of the affiant showed that gamblers did not normally keep permanent records and were able to destroy any records immediately prior to or during a search, and that this occurrence was heightened in the present case because the location of the gambling business at 291 Palmdale Drive prevented an agent from executing a search warrant without prior detection by one of the suspects (Id. at 33-34).

(7) When appellant Kelsey was arrested by Buffalo Police on July 7, 1975, he was observed burning gambling notes and other paraphernalia, thus destroying all the papers (Id. at 33).

(8) Even if such records were obtainable it would be difficult -- if not impossible -- to prove that the individuals designated on the records were an integral part of the operation, rather than mere bettors (as required by 18 U.S.C. 1955) (Ibid.).

(9) Individual bettors, who would be government witnesses, could only be discovered through the interceptions (Gov. App. 35).

(10) The scope of the operation and the identity of its participants could only be discovered and proved through this investigative procedure (Id. at 34-35).

This information clearly demonstrated the need to resort to electronic surveillance.

A. The Affidavit Satisfied The Statutory Standard.

An affidavit should be read "in a practical and commonsense fashion" to determine if it has satisfied the statutory requirement of 18 U.S.C. 2518(1)(c). United States v. Schwartz, 535 F.2d 160, 163 (2nd Cir. 1976); United States v. Steinberg, 525 F.2d 1126, 1130 (2nd Cir. 1975), cert. den., 425 U.S. 971; Senate Report No. 1097, 90th Cong., 2nd Sess., on The Omnibus Crime Control and

Safe Streets Act of 1968, 1968 U.S. Code Cong. and Admin. News at 2190. Such a reading fully supports the district court's express conclusion that "normal investigative procedures either have been tried without success and reasonably appear unlikely to succeed if continued, or reasonably appear unlikely to succeed if tried" (Gov. App. 2). As the Supreme Court has noted, Section 2518(1)(c) "is simply designed to assure that wiretapping is not resorted to in situations where traditional investigative techniques would suffice to expose the crime." United States v. Kahn, 415 U.S. 143, 153, n. 12 (1974). Moreover, "[m]erely because a normal investigative technique is theoretically possible, it does not follow that it is likely * * * *" (Senate Report No. 1097, supra). Thus, Congress did not intend the provision "to preclude resort to electronic surveillance until after all possible means of investigation have been exhausted by investigative agents." United States v. Hinton, supra, 543 F.2d at 1011. Rather, the requirement of the statute is met if the affidavit contains sufficient data from which the issuing judge can reasonably conclude that electronic surveillance is necessary to obtain sufficient evidence to convict persons known to be involved in the offenses and the identities of all of the participants. United States v. Hinton, supra, 543 F.2d at 1011; United States v. Steinberg, supra, 525 F.2d at 1130. Accord, e.g., United States v. Daly, 535 F.2d 434, 438-439 (8th Cir. 1976); United States v. Vento, 533 F.2d 838, 850 (3rd Cir. 1976); United States v. James, 494 F.2d 1007, 1016 (D.C. Cir. 1974), cert. den., sub nom., Jackson v. United States,

419 U.S. 1020; United States v. Pacheco, 489 F.2d 554, 565 (5th Cir. 1974), cert. den., 421 U.S. 909. The Poerstel affidavit met this test.

In addition, we note that considerable discretion rests with the issuing court in determining whether the interception is necessary[11/] (United States v. Matya, 541 F.2d 741, 745 (8th Cir. 1976), cert. den., No. 76-503, February 22, 1977; United States v. McCoy, 539 F.2d 1050, 1056 (5th Cir. 1976); United States v. Smith, 519 F.2d 516, 518 (9th Cir. 1975)) and its determination should be sustained if based on some "factual predicate" in the affidavit. E.g., United States v. McCoy, supra, 539 F.2d at 1055; United States v. Armocida, 515 F.2d 29, 38 (3d Cir. 1975), cert. den., sub nom., Conti v. United States, 423 U.S. 858. In making his determination the issuing judge may, and indeed should, consider the type of illegal activity under investigation, the extent to which it involves telephonic communications, and the opinions of experienced investigators. E.g., United States v. Hinton, supra, 543 F.2d at 1011; United States v. Anderson, 542 F.2d 428, 432 (7th Cir. 1976); United States v. DiMuro, 540 F.2d 503, 510 (1st Cir. 1976), cert. den., No. 76-252, January 10, 1977; United States v. Steinberg, supra, 525 F.2d at 1130; United States v. Bobo, 477 F.2d 974, 982-983 (4th Cir. 1973), cert. den., sub nom., Gray v. United States, 421 U.S. 909.

11/ The issuing judge is, of course, free to request additional information regarding the feasibility of alternative investigative techniques if he is not satisfied with the showing made in the application. See, 18 U.S.C. 2518(2).

B. Appellants' Assertion That Other Investigative Techniques Were Available Is Without Foundation.

Appellants raise a number of arguments to support their contention that the government did not exhaust all reasonable investigative techniques prior to its application for the wiretap. They allege that (1) except for the statement that the informants would not testify, the affidavit consisted merely of "boiler plate" language; (2) the informants could have been offered immunity; (3) the physical surveillances and evidence gathered pursuant to search and arrest warrants would have been sufficient proof for a conviction; and (4) a proper representation of fact in the affidavit regarding a surveillance of Owczarzak would have shown that other investigative techniques were available. At the outset, we note that appellants failed to assert any particular grounds -- except the claim of intentional misrepresentation in describing the geographical surrounding of 291 Palmdale Drive (which they do not now raise) -- in their pre-trial suppression motion, but merely contended that the government utilized general boiler-plate language in its affidavit (Gov. App. 39-44). At trial, when appellants renewed their suppression motion, the only further elucidation of their pre-trial motion was their statement that the motion was renewed "in the light of the evidence regarding the amount of surveillance and the results of the search" (Tr. 1969; see Tr. 890-891, 917, 1967). Accordingly, we submit that they have waived the right to challenge the intercepted conversations on any other grounds now advanced. E.g., United States v. Schwartz, supra, 535 F.2d at 163; United States v. Rollins, 522 F.2d 160,

165 (2nd Cir. 1975), cert. den., 424 U.S. 918; cf. United States v. Sisca, 503 F.2d 1337, 1346-1349 (2nd Cir. 1974), cert. den., 419 U.S. 1008; 18 U.S.C. 2518(10)(a); Rule 12(b)(3), (f), F.R.Crim. Pro. In any event, their claims lack any substance.

1. The affidavit was not based on boiler-plate. Appellants contend that the affidavit in this case is like the affidavit condemned in United States v. Kalustian, 529 F.2d 585 (9th Cir. 1976). That affidavit contained "mere conclusions" that did "not provide facts from which a detached judge or magistrate [could] determine whether other alternative investigative procedures exist[ed] as a viable alternative" to wiretapping. United States v. Kalustian, supra, 529 F.2d at 590; see also United States v. DiMuro, supra, 540 F.2d at 510-511. But see, United States v. McCoy, supra, 539 F.2d at 1056. The affidavit here clearly does not rest on such assertions. Instead, the issuing judge was presented with a complete and detailed picture of the status of the investigation (i.e., use of informants who refused to testify, failure to identify any bettors who could possibly be government witnesses, unproductive physical surveillances, and failure to uncover the scope of the operation) plus detailed reasons -- based in part on the past experience of the affiant -- why electronic surveillance was required for the gathering of sufficient evidence. This is a far cry from the situation in a case like United States v. Kalustian. As a comparison of the affidavit involved in United States v. Kalustian, supra, 529 F.2d at 587-588 and the affidavit involved here (Gov. App. 6-37) readily demonstrates, the instant

affidavit clearly provided a sufficient factual statement to enable the court to conclude, as it did, "that investigative procedures other than wiretapping would be unlikely to succeed." United States v. Schwartz, supra, 535 F.2d at 163.

2. The government was not required to grant informants immunity before it could rely on their refusal to testify as a factor supporting the application to wiretap. Appellants cite no authority to substantiate their claim that the government was required to offer informants immunity before it could rely on their refusal to testify as a factor necessitating the granting of a wiretap. Moreover, appellants' claim is fully answered by the Third Circuit's opinion in United States v. Vento, supra, 533 F.2d at 849, which noted (footnotes omitted):

> [This contention] relies almost exclusively on the first clause of section 2518(3)(c) * * * and ignores the desjunctive language of that provision -- "or reasonably appear to be unlikely to succeed if tried or to be too dangerous." * * * There is no requirement that every investigative methodology be exhausted prior to application for a section 2518 authorization. Investigators are not obliged to try all theoretically possible approaches. * * * *

See also United States v. Matya, supra, 541 F.2d at 744-746; United States v. Pezzino, 535 F.2d 483, 484 (9th Cir. 1976), cert. den., No. 75-6651, October 4, 1976.

3. Sufficient evidence could not be gleaned from surveillance or warrant authorized searches and seizures. Appellants also contend that the physical surveillances produced sufficient evidence for conviction because the government had learned of the identity

of four participants (Lombardo, Kelsey, DiCarlo, and codefendant Silverstein), and if the government had "properly" maintained surveillance of DiCarlo, it would have learned of Owczarzak.[12/] Thus, appellants' argument continues, the government would have had "their five bodies and in a sweeping series of arrests and raids on the betting premises would have secured more than enough evidence to lead to convictions" (DiCarlo at 13).

This claim answers itself. As the informants would not testify, the sole product of surveillance would have been evidence of the identity of five individuals -- who were observed at two apartments on various evenings between the hours of 4:00 p.m. and 6:00 p.m. on Monday through Friday, and 12:00 p.m. through 2:00 p.m. and 4:00 p.m. to 6:00 p.m. on the weekends, as well as of the meetings of some of the appellants at varied locations.

12/ The wiretap application and affidavit of October 31, 1975 referred to Owczarzak as "Ozzie", the name given by a confidential informant as one of the participants. Although the government had identified appellant Owczarzak by October 15, 1975 (DiCarlo App. 92-93), it was not conclusively determined at the time of the wiretap application that he was the same individual described by the informant. Appellants contend that since DiCarlo and Owczarzak had operated the telephones at Susan Jenkins' apartment (Apt. B, 3 Windham Court) and the government was aware of the identity of DiCarlo, it could have easily learned of Owczarzak's identity by following DiCarlo to that location, and thus the government would have had sufficient evidence of the involvement of five individuals. Notwithstanding that this claim has little merit in establishing that the affidavit was insufficient, surveillance of DiCarlo would not have led the government to Windham Court, as this location of the gambling operation had not begun until November 1, 1975 (Tr. 681-682, 1062-1072, 1148-1149). Furthermore, as to DiCarlo's claim that the "Records Check" section of the affidavit reveals no interest in him (DiCarlo at 17), the affidavit shows that his arrest record was investigated (Gov. App. 30).

This falls far short of satisfying the government's burden of proof in a prosecution for conducting a gambling operation. Without the wire interceptions, the government had no evidence that appellants "conduct[ed], financ[ed], manag[ed], supervis[ed], direct[ed], or own[ed] all or part of an illegal gambling business * * * [which was in] violation of the law of [New York] * * * [and was] in substantially continuous operation for a period in excess of thirty days or [had] a gross revenue of $2,000 in any single day" (18 U.S.C. 1955). As the affidavit stated, the entire scope of the operation and the identity of all its participants could not be uncovered without the wire interceptions (Gov. App. 34-35). Indeed, as appellants concede (Lombardo at 8; Kelsey at 8; DiCarlo at 14-16), wiretapping is appropriate in such instances. (See cases cited at 12-13, supra).[13/]

Similarly, appellants' claim that sufficient evidence could have been obtained through conventional searches of the gambling premises and the arrests of appellants is refuted by the fact that the probative value of the evidence admitted at trial, which was seized pursuant to these methods, was far from sufficient to support appellants' convictions (see Statement, supra, at 8). See also United States v. Caruso, 415 F.Supp. 847, 852 (S.D. N.Y. 1976).

13/ The evidence at trial demonstrated that at least ten other individuals, whose identities were learned through the interceptions, were participants in the operation (see Statement, supra, at 6-7). Moreover, the December 1, 1975 affidavit for the second application of interceptions stated that the previous telephone communications "has revealed a betting line operation which appears to be headquartered out of the New York State area (Gov. App. 38) (see Tr. 1830).

4. The application contained no misrepresentation of fact. Nor, as appellants suggest, did the application contain any misrepresentation through its omission of the surveillance of Owczarzak on October 15, 1975. Agent Poerstel's failure to note the observation of Owczarzak talking with Kelsey in a parking lot on October 15, 1975 and Kelsey's receipt of "something" from Owczarzak on that date was not shown by appellants to be an intentional omission, or a product of a reckless disregard for the truth. See, e.g., United States v. Schwartz, supra, 535 F.2d at 163; United States v. Pond, 523 F.2d 210, 213-214 (2nd Cir. 1975), cert. den., 423 U.S. 1058; United States v. Gonzalez, 488 F.2d 833, 837-838 (2nd Cir. 1973). Cf. United States v. Steinberg, supra, 525 F.2d at 1131. In fact, the omission was immaterial since its inclusion would not have shown that other investigative techniques were available. United States v. Woods, 544 F.2d 242, 257 (6th Cir. 1976). See also, e.g., United States v. Pond, supra, 523 F.2d at 214; United States v. Gonzalez, supra, 488 F.2d at 838.

In sum, the affidavit in support of the application for the wiretaps contained an ample basis for the issuance of the order permitting interception of appellants' telephone conversations.

II.

THE COURT DID NOT ERR IN SEATING TWO JURORS, NOR WERE APPELLANTS PREJUDICED BY THE DISMISSAL OF THESE JURORS FOR REASONABLE CAUSE DURING TRIAL

Appellants claim that the court erred in seating two jurors when it was aware during voir dire examination that these jurors had commitments which could have interfered with their tenure,[14/] and then excusing the jurors and replacing them with alternates when events indicated their commitments did in fact interfere with the tenure as jurors. Appellants assert that they were prejudiced by these actions because they resulted in the seating of Michael Fox -- an alternate juror who was an employee of the government (Lombardo at 12-17; Kelsey at 12-17; DiCarlo at 4-11).

Prior to the weekend adjournment on the eighth day of trial on August 27, 1976, Juror Micharl Mason was excused so that he could attend a pre-arranged vacation which was to begin on the following Monday (DiCarlo App. 72-73). When trial resumed on August 31, 1976 and Mason was not present, the court replaced him with the first alternate juror (Gov. App. 84-85). After an additional three and one-half days of trial, the court was also apprised that Juror Norman Gardner's employment responsibilities for supervising the reorganization of a school district's bussing system made "it highly necessary" for him to conduct a meeting of the district's

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14/ As appellants voiced no objection to the seating of the jurors and could have avoided any prejudice which they claim resulted from the eventual excusal of the jurors (see discussion, infra, at 28), their allegation can only be reviewed by this Court if it amounts to plain error affecting their "substantial rights." Rule 52(b), F.R.Crim.Pro. Accord, United States v. Colabella, 448 F.2d 1299, 1302 (2nd Cir. 1971), cert. den., 405 U.S. 929.

bus drivers on September 7, 1976, from 9:00 a.m. to at least 11:30 a.m. (Id. at 92-96).[15/] After the court carefully questioned Gardner as to his role in the reorganization plan, and without giving any "indication" to the juror whether he would be excused, the court advised counsel of this situation (DiCarlo App. 77-85).

Cognizant of the fact that Michael Fox (the second alternate juror) was unsuccessfully challenged for cause by appellants,[16/] and that Fox would replace Gardner if Gardner were dismissed, the court stated that it "would like to hear any suggestions that any of you have to put to me, while I make up my mind on the situation" (Id. at 80). Counsel for Owczarzak suggested that the trial proceed with eleven jurors, rather than having Fox seated, but appellants could not reach agreement on this proposal (Id. at 80-82). The government suggested that the trial be delayed until the afternoon of September 7, 1976, so that Gardner could fulfill his employment obligations and the trial could then proceed with twelve jurors. The court, however, felt that since the trial had reached the stage of closing arguments, delaying trial until the afternoon

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15/ The court conversed with Gardner and the second alternate juror in an on the record proceeding in the court's chambers out of the presence of appellants and counsel. Appellants do not contest the propriety of this proceeding (DiCarlo at 5), and this Court has held that such action by a trial court is proper. United States v. Maxwell, 383 F.2d 437, 443 (2nd Cir. 1967), cert. den., sub nom., Aiken v. United States, 389 U.S. 1043; United States v. Houlihan, 332 F.2d 8, 12-13 (2nd Cir. 1964), cert. den. sub nom., Legere v. United States, 379 U.S. 859; United States v. Woodner, 317 F.2d 649, 652 (2nd Cir. 1963), cert. den., 375 U.S. 903.

16/ Fox was an employee with the Internal Revenue Service and had the duty of advising the public on the preparation of tax returns (Gov. App. 66, 68). Because of this employment, appellants challenged Fox for cause (Gov. App. 80-82).

of that day would result in the jury not beginning deliberations until 6:30 p.m. or 7:00 p.m. that evening (see also United States v. Domenech, 476 F.2d 1229, 1232, n. 4 (2nd Cir. 1973), cert. den., 414 U.S. 840). It therefore suggested -- somewhat reluctantly -- that closing arugment by the government be given on Friday, September 3, 1976, so that the jury could begin deliberations earlier on September 7, 1976. The government, however, objected to separating the arguments and was also not prepared to give its summation at that time and it therefore proposed having the trial adjourned for a week. Counsel for Lombardo and Owczarzak expressly voiced no objections to any of the government's suggestions (DiCarlo App. 82-84). No decision as to the juror problem was reached by the court at that time, but at the end of the day's proceedings the court ruled (Gov. App. 99):

> There is a possibility perhaps of having a week's adjournment in this case, but I decided that that is not a healthy situation in a case of this complexity and magnitude. It is going to be difficult even with the capable summations of attorneys to get all of this pulled together in your mind so that you, pursuant to my instructions, can properly deliberate. If we let a week go by, a week plus two weekends, it would have to off [sic] until the 14th, and that would be impossible, in my mind. So I have decided that while we must close off now, that we will do so only until nine o'clock on Tuesday morning, the 7th. Come in at that time. Mr. Gardner, if your situation changes, fine, I will be delighted to see you here. If you find that you are in exactly the same situation that you have elaborated to me,

> and it is unchanged, then I will recognize that you cannot be here. * * * * 17/

When trial resumed at 11:35 a.m. on September 7, 1976, Gardner was not present, and he was therefore replaced by Fox (DiCarlo App. 89).

A. The District Court Did Not Err In Retaining And Later Excusing The Two Jurors.

The court's retaining and then later excusing the two jurors was clearly not erroneous. In the first place, appellants' contention to the contrary notwithstanding (Lombardo at 13; Kelsey at 13; DiCarlo at 5, 10), the court had no advance indication that it would have to excuse the two jurors. Although the court was apprised during voir dire on August 17, 1976 that Mason had planned a vacation commencing on August 30, 1976, it "had every expectancy when the jury was being selected that the verdicts (if any) would be rendered before Mason's scheduled vacation" (DiCarlo App. 69), because the court was "hopeful that * * * the case [would be] disposed of by [August 27, 1976]"(Gov. App. 97-98; see also DiCarlo App. 75). Furthermore, although Judge Elfvin was aware that "[Gardner] had a position of responsibility * * * concerning school bussing, * * * [which] necessitat[ed] a lot of time on his part, and [had] told him that [he] thought we would be able to work that out during [Gardner's] jury service" (DiCarlo

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17/ Contrary to appellants' contention that the court allowed Gardner "to excuse himself" (Lombardo at 16, Kelsey at 16, DiCarlo at 9), the above quoted passage, when read in its entirety (Gov. App. 97-100), shows that the court's statement merely reflected its "reasonable hope * * * that Gardner would find means to be present on the morning of [September 7, 1976]" (DiCarlo App. 69).

App. at 77-78), the court "had no advance knowledge or warning that [Gardner] was to be involved in any meeting or event on [September 7, 1976]" (Id. at 69). Thus, the record demonstrates that at the time Judge Elfvin conducted the voir dire, he properly concluded that Mason and Gardner would have no outside interferences with their jury service.

Moreover, the court's decision to dismiss the jurors was proper. The decision to substitute an alternate juror for a member of the panel is entrusted to the sound discretion of the trial judge. United States v. Floyd, 496 F.2d 982, 990 (2nd Cir. 1974), cert. den., sub nom., Miller v. United States, 419 U.S. 1069; United States v. Domenech, supra, 476 F.2d at 1232. See also, United States v. Jones, 534 F.2d 1344, 1346 (9th Cir. 1976), cert. den., No. 75-6699, October 4, 1976; United States v. Gay, 522 F.2d 429, 435 (6th Cir. 1975). As this Court has held, "The substitution of an alternate for a juror for reasonable cause is within the prerogative of the trial court and does not require the consent of any party." United States v. Ellenbogen, 365 F.2d 982, 989 (2nd Cir. 1966), cert. den., 386 U.S. 923. Although the court did not explain the reason for its decisions of excusal, it is likely it feared that both jurors -- had they not been dismissed after sitting on the jury past the time which was indicated to them by the court for the length of the trial -- could have been preoccupied with their outside commitments in such a fashion as to interfere with the performance of their duties (see DiCarlo App. 72, 77-79; Gov. App. 46, 58, 60). Its refusal to dismiss may therefore have resulted in resentment on

the part of the jurors towards either side or the court itself, thus creating the possibility that an unfair verdict could be rendered. It is a proper exercise of discretion to dismiss jurors where outside circumstances have become so disturbing that the jurors no longer appear able to give their undivided concentration to reaching a verdict. Cf., United States v. Hoffa, 367 F.2d 698, 712 (7th Cir. 1966), vacated and remanded on other grounds, 387 U.S. 231 (1967); United States v. Houlihan, supra, 332 F.2d at 12.

B. Appellants Suffered No Harm As A Result Of The Substitution Of The Jurors.

In any event, "[a] party claiming to be injured by [a substitution of a juror] is entitled to a new trial only on a clear showing of prejudice to him." United States v. Ellenbogen, supra, 365 F.2d at 989. Accord, e.g., United States v. Floyd, supra, 496 F.2d at 990; United States v. Domenech, supra, 476 F.2d at 1232. Appellants' contention that they were prejudiced by the seating of Fox, is insubstantial. Apparently, they claim that the mere fact that Fox was an employee of the Internal Revenue Service implies a partiality on his part in favor of the government, and that the court therefore erred in refusing to grant their challenge for cause. But the Supreme Court has held that the fact of a juror's employment with the government is not sufficient -- in and of itself -- to raise a presumption of partiality in the juror. Dennis v. United States, 339 U.S. 162

(1950); Frazier v. United States, 335 U.S. 497 (1948); United States v. Wood, 299 U.S. 123 (1936). See, Mikus v. United States, 433 F.2d 719, 724 (2nd Cir. 1970). Indeed, the Court in Frazier held that the petitioner was not denied his constitutional right to be tried by an impartial jury by reason of the fact that all twelve jurors were employed by the federal government. As the Court observed in United States v. Wood, supra, 299 U.S. at 134:

> In dealing with an employee of the Government, the court would properly be solicitous to discover whether, in view of the nature or circumstances of his employment, or of the relation of the particular governmental activity to the matters involved in the prosecution, or otherwise, he had actual bias, and, if he had, to disqualify him. No bias of that sort is shown in the instant case.

Here, Judge Elfvin thoroughly examined Fox to insure that his impartiality would not be affected by reason of his employment. See Mikus v. United States, supra, 433 F.2d at 724; United States v. Palumbo, 401 F.2d 270, 275 (2nd Cir. 1968), cert. den., 394 U.S. 947. This inquiry established that Fox understood -- with no compunction -- that the government had the burden of proof and appellants had no duty to present any evidence (Gov. App. 67); that he accepted "without reservation" that appellants were presumed innocent until proven guilty beyond a reasonable doubt (Id., at 67-68); that his employment involved no contact with investigative work and some contact with special agents in the investigative division (Id. at 68-69); that the fact of his employment would not result in his being "more inclined to go along with the Government in this case" (Id. at 69); and that

he would not "be at all embarrassed to be part of a jury that returned a verdict of not guilty when [he had] this employment" (Ibid.). Furthermore, the court allowed counsel the opportunity to fully explore any possible basis for prejudice in Fox (see Mikus v. United States, supra, 433 F.2d at 724; United States v. Haynes, 398 F.2d 980, 984 (2nd Cir. 1968), cert. den., 393 U.S. 1120), with the end result being that Fox's impartiality was not impeached (Gov. App. 70-80).

Thus, the court properly fulfilled its "serious duty to determine the question of actual bias" (Dennis v. United States, supra, 339 U.S. at 168), and concluded that "[Fox's] answers unequivocally showed his lack of predisposition in this case * * * and I had and have full confidence in juror Fox's complete lack of bias, prejudice or predisposition" (DiCarlo App. 68-69). In short, appellants have failed to "raise a contention of bias from the realm of speculation to the realm of fact." Dennis v. United States, supra, 339 U.S. at 168, quoted in United States v. Haynes, supra, 398 F.2d at 984.[18/]

18/ Even if a factual predicate had been laid by appellants for the excusal of Fox for bias, such a decision was within the broad discretion of the trial court. United States v. Tramunti, 513 F.2d 1087, 1114 (2nd Cir. 1975), cert. den., 423 U.S. 832; United States v. Grant, 494 F.2d 120, 123 (2nd Cir. 1974), cert. den., 419 U.S. 849; United States v. Ploof, 464 F.2d 116, 118 (2nd Cir. 1972), cert. den., sub nom., Godin v. United States, 409 U.S. 952.

C. Appellants Waived Objection To The Seating Of Fox Since They Did Not Exercise Their Remaining Peremptory Challenges.

Finally, appellants had it within their power during the jury selection[19/] to have avoided any possibility that Fox would be seated as a juror. Although Gardner's employment situation and Mason's vacation commitment were known to appellants during the voir dire examination (Gov. App. 46-50, 58, 60), appellants waived a total of six peremptory challenges (one on the fifth round and five on the final round, id. at 51-57, 59, 61-63) which they could have utilized to strike either juror,[20/] if, as they now claim, they were concerned that the jurors would not be present for the entire trial. Furthermore, contrary to DiCarlo's characterization of the record (DiCarlo at 5), no objection was voiced by appellants to the seating of Mason or Gardner (see Gov. App. 63-64). In these circumstances, appellants' failure to exercise their remaining peremptory challenges resulted in the waiver of any right to object to the seating of Fox. See, e.g., Frazier v. United States, supra, 335 U.S. at 505, 507; United States v. Colabella, supra, 448 F.2d at 1302; United States v. Ragland, 375 F.2d 471, 475 (2nd Cir. 1967), cert. den., 390 U.S. 925;

19/ The court granted the government seven peremptory challenges which were to be exercised in the following manner: one challenge on the first five rounds of jury selection and two challenges on the sixth round. Appellants were allotted fifteen peremptory challenges, of which two were to be exercised jointly on each of the first five rounds, and the remaining five challenges were to be exercised individually on the sixth and final round of selection (Gov. App. 51-57, 59, 61-63).

20/ Gardner was seated on the first round of jury selection and Mason was seated on the fourth round (Gov. App. 45, 57).

United States v. Puff, 211 F.2d 171, 185 (2nd Cir. 1954), cert. den., 347 U.S. 963; cf. United States v. Haynes, supra, 398 F.2d at 983.

III.

THE COURT PROPERLY IMPOSED CONSECUTIVE TERMS OF TWO YEARS' IMPRISONMENT ON APPELLANT LOMBARDO FOR CONSPIRACY TO VIOLATE 18 U.S.C. 1955 AND THE SUBSTANTIVE OFFENSE OF CONDUCTING A GAMBLING BUSINESS

Appellant Lombardo was sentenced to consecutive terms of two years' imprisonment for conspiring to conduct a gambling business (18 U.S.C. 371) and conducting a gambling business (18 U.S.C. 1955). He claims that the evidence showed that the conspiracy was comprised of only five people -- "the minimum number of persons needed to constitute a violation of the substantive offense" (Lombardo at 21) -- and that therefore the court's imposition of consecutive sentences violated Iannelli v. United States, 420 U.S. 770 (1975) and Wharton's Rule.[21] (Lombardo at 18-21). This contention is foreclosed by a reading of Iannelli v. United States itself

In Iannelli, the Supreme Court upheld separate convictions and consecutive sentences for conspiracy to conduct a gambling business and the substantive offense of conducting a gambling business, in violation of 18 U.S.C. 1955.[22] In analyzing the

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21/ Wharton's Rule provides:

> An agreement by two persons to commit a particular crime cannot be prosecuted as a conspiracy when the crime is of such a nature as to necessarily require the participation of two persons for its commission.

1 R. Anderson, Wharton's Criminal Law and Procedure, §89, p. 191 (1957).

22/ Fourteen named codefendants and seven unindicted coconspirators were charged with both offenses.

continued vitality of Wharton's Rule, the Court stated that the Rule is only "a judicial presumption, to be applied in the absence of legislative intent to the contrary" Iannelli v. United States, supra, 420 U.S. at 782. The Court concluded, however, that in passing The Organized Crime Control Act of 1970, Pub.L. No. 91-452, 84 Stat. 922, "Congress manifested its clear awareness of the distinct nature of a conspiracy and the substantive offenses that might constitute its immediate end" (Id. at 788), and it stated that if Congress had "intended to foreclose the possibility of prosecuting conspiracy offenses under §371 by merging them into prosecutions under §1955, * * * it would have so indicated explicitly" (Id. at 789). Since the Court found that "Congress authorized prosecution and conviction for both offenses in all cases under the statute (Id., at 783, n. 15, emphasis added), it concluded it was unnecessary to decide whether "the third-party exception" to Wharton's Rule[23/] could be properly applied to conspiracies involving more than five persons, because it would "seem anomalous to conclude that Congress intended the substantive offense to subsume the conspiracy in one case but not in the other" (Ibid.). Therefore, the Court observed that regardless of the number of individuals comprising the conspiracy to violate Section 1955, the legislative intent of permitting

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23/ This exception "renders Wharton's Rule inapplicable when the conspiracy involves the cooperation of a greater number of persons than is required for commission of the substantive offense." Iannelli v. United States, supra, 420 U.S. at 775. See Gebardi v. United States, 287 U.S. 112, 122, n. 6 (1932); United States v. Bommarito, 524 F.2d 140, 144 (2nd Cir. 1975); United States v. Becker, supra, 461 F.2d at 234; United States v. Benter, 457 F.2d 1174, 1178 (2nd Cir. 1972), cert. den., 409 U.S. 842.

prosecution for the conspiracy and substantive offense in all instances more than outweighed the Wharton Rule presumption of merger. Id., at 791.[24/]

Appellant's case falls directly within the corners of the Court's holding.[25/]

24/ Even if Wharton's Rule was deemed applicable to the instant case, "a basis exists for invocation of the 'third party exception' to the rule." United States v. Bommarito, supra, 524 F.2d at 144. Here, the indictment charged the five named defendants with conspiring with each other "and others" (Lombardo App. 1), and there was ample evidence at trial (see Statement, supra, at 6-7) to establish that the conspiracy did involve a greater number of participants than were necessary to complete the substantive offense. United States v. Bommarito, supra, 524 F.2d at 144.

25/ To the extent appellant may be arguing that he was entitled to concurrent sentencing apart from any requirement under Iannelli v. United States, -- he has no such right. See United States v. Wenger, 457 F.2d 1082, 1083-1084 (2nd Cir. 1972), cert. den., 409 U.S. 843. Moreover, the sentencing proceeding (Lombardo App. 101-106) demonstrates that the court meted out consecutive sentences for the conspiracy and substantive offenses because Lombardo was the central figure "who was really mainly operating" the gambling business (Lombardo App. 102). See Iannelli v. United States, supra, 420 U.S. at 784, 791. Indeed, appellant's counsel even noted, "obviously the proof was that [Lombardo] was the leader of this, and we knew the sentence would fall more heavily on him" (Lombardo App. 109).

Appellant misreads footnote 18 in Iannelli, supra, 420 U.S. at 786 (Lombardo at 19). The statement there on the avoidance of dual punishment when a defendant is convicted for both the conspiracy and substantive offenses was made in referrence to a situation where Wharton's Rule is deemed applicable. As we have shown, this is not the case here.

IV.

DISTRICT JUDGE ELFVIN DID NOT ERR IN REFUSING TO RECUSE HIMSELF BECAUSE OF HIS FORMER INVOLVEMENT AS UNITED STATES ATTORNEY IN TWO PRIOR UNRELATED PROSECUTIONS OF APPELLANT LOMBARDO

Appellant Lombardo also contends (Lombardo at 22-27) that Judge Elfvin should have recused himself pursuant to 28 U.S.C. 455 because of his former involvement during his tenure as United States Attorney for the Western District of New York in two prior unrelated prosecutions of appellant. This claim is similarly unavailing.

In response to the court's pre-trial request on March 25, 1976, regarding a possible problem of recusal, Special Attorney Richard D. Endler supplied the court with the factual background of its involvement as United States Attorney in a past prosecution of appellant (reproduced at Addendum A4-A6). This showed that almost two and one-half years before Judge Elfvin began acting as United States Attorney in approximately June, 1972, Lombardo and two other individuals were indicted for violations of 18 U.S.C. 1084 and 1952. Their trial began on January 4, 1972. On February 3, 1972, the jury, which was unable to reach a verdict, was dismissed by Judge Henderson, who then declared a mistrial. On February 25, 1974, while Judge Elfvin was United States Attorney, Lombardo and a codefendant filed a motion to dismiss the indictment because of a claimed denial of speedy trial. On June 28, 1974, Judge Curtin granted the motion. During the next two months, the Buffalo Strike Force, through one of its attorneys, Robert C. Stewart, and the Solicitor General's office discussed

whether an appeal from the dismissal of the indictment would be taken. On August 2, 1974, the Solicitor General's office advised the Buffalo Strike Force that no appeal was authorized.

Except for this incident, and an unrelated tax prosecution brought against Lombardo in the early part of 1974,[26/] Judge Elfvin had no other involvement with Lombardo during his tenure as United States Attorney. Significantly, the instant case arose out of an investigation initiated in approximately July, 1975, about six months after Judge Elfvin left the office of the United States Attorney, and did not involve any facts arising out of the earlier prosecutions. In this setting, Judge Elfvin properly refused to recuse himself.[27/]

26/ Appellant was indicted on February 7, 1974 (No. CR 74-51) for two counts of income tax evasion for the years 1967 and 1969, in violation of 26 U.S.C. 7201, and 3 counts of making fraud and false statements in income tax returns for the years 1967, 1968, and 1969, in violation of 26 U.S.C. 7206(1). On December 10, 1976, appellant pleaded guilty before Judge Curtin to one count of violating 26 U.S.C. 7206(1), and he was sentenced by Judge Curtin, on February 24, 1977, to eighteen months of imprisonment.

27/ The only reference in the record on a possible problem of recusal because of these two former prosecutions is the following colloquy between the court and counsel for Lombardo during an in-chambers conference held before the voir dire examination on August 17, 1976 (Tr. In-chambers Conference and voir dire, August 17, 1976, 28-29):

> MR. DOYLE (Counsel for appellant): The final matter that I mentioned, your Honor, I know the Court is aware of it, but I am placing the motion formally on the record, I know the Court dealt with this a number of times by the virtue of his recent elevation to the bench, but in this particular case the defendant, Joseph Lombardo, has been indicted two times on prior occasions by the United States Attorney for the Western District of New York, and, as you know, that was you, your Honor, and he was indicted in connection with a prior violation basically involving the same type of activity and, in addition, he was indicted on

Appellant, however, asserts two bases for recusal; neither of which are substantial. First, appellant contends that because 28 U.S.C. 547 has been interpreted as making a United States Attorney "of counsel" in any criminal prosecution brought within his district (United States v. Amerine, 411 F.2d 1130, 1133 (6th Cir. 1969), Judge Elfvin's tenure as United States Attorney therefore mandated his disqualification under the clause in the former version of 28 U.S.C. 455,[28/] which provided:

27/ (CONT'D)

> an income tax charge. In light of the fact [29] that obviously the prosecutor has both the obligation to prosecute the guilty and to defend the innocent, certain beliefs must have been formed, so that it is unethical for the Court to proceed when you were acting as United States Attorney and, accordingly, in order to protect the record, I ask the Court to recuse itself in connection with Mr. Lombardo.
>
> THE COURT: Yes. I have taken the position on that that there is no need for me to recuse myself in this situation merely because I, on an earlier occasion, as the prosecutor had something to do with prosecuting or knowing about alleged criminality on the part of the defendant who now stands before me charged with a separate crime.
>
> MR DOYLE: With distinction, of course, the 1970 and '72 incidents were of an identical character, which I felt added some difficulties.

28/ This statute was amended December 5, 1974, Pub.L. 93-512, 88 Stat. 1609. The present version of 28 U.S.C. 455 (see supra, at) is applicable to appellant's trial.

> Any * * * judge * * * shall disqualify himself in any case in which he has * * * been of counsel * * * *

But the courts of appeals which have interpreted this provision have concluded that recusal was applicable only if the judge served in an "of counsel" capacity in the same case which he was to preside over. Barry v. United States, 528 F.2d 1094, 1098-1099 (7th Cir. 1976), cert. den., No. 75-1702, October 4, 1976; In re Grand Jury Investigation, 486 F.2d 1013, 1015-1016 (3rd Cir. 1973), cert. den., sub nom., Testa v. United States, 417 U.S. 919; Gravenmier v. United States, 469 F.2d 66, 67 (9th Cir. 1972); United States v. Wilson, 426 F.2d 268, 269 (6th Cir., 1970); United States v. Vasilick, 160 F.2d 631, 632 (3rd Cir., 1947). In determining when a "case" comes into existence, the court in United States v. Wilson, supra, 426 F.2d at 269 observed:

> A "case" does not, of course, necessarily come into being with the happening of the offense. The critical point for mandatory disqualification is, we think, the initiation of the prosecution. For purposes of 28 U.S.C. §455, we believe that a "case" begins with the first formal prosecutorial proceedings (arrest, complaint or indictment) which is designed to bring a named alleged offender before the court.

Here, not only was there no formal prosecution of the instant case until after Judge Elfvin left his position as United States Attorney, but the investigation of the present offenses was also not commenced during the court's tenure as United States Attorney.

Moreover, this reading of the statute is supported by the version of Section 455 now in effect. Section 455(b)(3) "is

intended to cover the situations which can occur during the first two or three years of judicial service of a lawyer who is appointed to the bench from service as a government lawyer." House Report No. 93-1453, 93 Cong. 2d Sess., on Disqualification of Judges, 1974 U.S. Code Cong. and Admin. News at 6355-6356. It provides "a statutory solution to the problems which have confronted many * * * federal judges who came to the bench from prior service as a District Attorney, from the Department of Justice or from a federal agency." Id., at 6356. Thus, disqualification in these circumstances is required only when the court:

> [H]as served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy[.]

28 U.S.C. 455 (b)(3) (emphasis supplied). "Proceeding" is defined to include the "pretrial, trial, appellate review, or other stages of litigation" (28 U.S.C. 455(d)(1), and Congressman Kastenmeier, who sponsored the 1974 amendment to Section 455, viewed the term "case in controversy" to refer to "the then pending litigation, rather than to an analogous situation." 120 Cong.Rec. H. 10731 (daily ed. November 18, 1974). Therefore, since Judge Elfvin had not participated as counsel in any phase of the present matter, nor expressed any opinion concerning its merits while he served as United States Attorney, disqualification was not required. See Laird v. Tatum, 409 U.S. 824, 828-829 (1972) (Rehnquist, J., in chambers).

Appellant's second claimed ground for recusal is that the court's prior involvement as United States Attorney gave it a "substantial interest" in "pushing [its] case to a successful conclusion" (Lombardo at 26). But as we have shown, 28 U.S.C. 455 (b)(3) which concerns the issue of disqualification in this situation, would not require recusal where the court has served in a prior capacity of United States Attorney unrelated to the case before it. Moreover, this claim for disqualification is taken from the former statute which required recusal whenever the court had "a substantial interest" in any case. But this provision has been interpreted to contemplate only a financial interest in the proceeding before the court. E.g., In re Grand Jury Investigation, supra, 486 F.2d at 1016; United States v. Bell, 351 F.2d 868, 878 (6th Cir. 1965), cert. den., 383 U.S. 947; see United States v. Ravich, 421 F.2d 1196, 1205 (2nd Cir. 1970), cert. den., 400 U.S. 834. Specifically, it has been held that the fact that a judge was United States Attorney while a defendant was prosecuted for a totally unrelated offense was not a sufficient reason to conclude that he had a "substantial interest" in a later prosecution against the defendant. In re Grand Jury Investigation, supra, 486 F.2d at 1016; Gravenmier v. United States, supra, 469 F.2d at 67.[29] See Firnhaber v.

29/ Adams v. United States, 302 F.2d 307 (5th Cir. 1962) is not to the contrary. Although the court there construed substantial interest "to comprehend the interest that any lawyer has in pushing his case to a successful conclusion" (id. at 310), the court concluded that such interest may exist where a judge has "'a prior knowledge of the facts, or a prior interest in an issue arising out of them * * * *'". (Ibid.). In Adams, the court reached

(FOOTNOTE CONT'D)

Sensenbrenner, 385 F.Supp. 406, 411 (E.D. Wis. 1974); see also Meeropol v. Nizer, ____ U.S. ____, 97 S.Ct. 687, 689, n.2 (1977) (Marshall, J.); In re Continental Vending Machine Corporation v. Wharton, 543 F.2d 986, 995 (2nd Cir. 1976).

The counterpart of the "substantial interest" clause of former Section 455 is now included in 28 U.S.C. 455(b)(4) which requires disqualification when a judge:

> [K]nows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controvery or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding[.]

Although there has been little occasion for courts to construe the meaning of "any other interest", the Fourth Circuit has concluded that this clause encompasses an economic interest "of lesser degree than ownership" [which if sufficient to warrant disqualification] "'depend[s] on the interaction of two variables: the remoteness of the interest and its extent or degree.'" In re Virginia Electric & Power Company, 539 F.2d 357, 367-368 (4th Cir. 1976). This seems to be the position of the drafters of the American Bar Association Code of Judicial Conduct (1972), from

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29/ (CONT'D)
this interpretation of substantial interest because the presiding judge in a trial of a defendant for perjury was the United States Attorney during the prosecution of the defendant for a liquor violation, out of which arose the perjury indictment. The court, however, found that the judge had neither prior knowledge of any facts of the earlier prosecution nor prior interest in an issue arising from any facts. Here, Judge Elfvin's involvement in the earlier Lombardo cases was in totally unrelated matters.

which the 1974 amendments of Section 455 were taken. See Thode, Reporter's Notes to Code of Judicial Conduct, 1973, pp. 63, 66. Moreover, a commentary on 28 U.S.C. 455(b)(4) has similarly concluded that "any other interest should be interpreted" in terms of economic interests," because "[n]oneconomic interests [which] may affect a judge's ability to be, or to seem, impartial, * * * can be handled adequately under the general provision [28 U.S.C. 455(a)] calling for disqualification if the judge's impartiality might reasonably be questioned." Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction §3547, pp. 366-367. Accord, Note, Disqualification of Judges and Justices in the Federal Courts, 86 Harv. L. Rev. 736, 754-755 (1973).

The determination whether recusal under the statute is required because of a personal bias or prejudice of a judge "'is a matter confined to the consideration and discretion of the judge himself.'" United States v. Patrick, 542 F.2d 381, 390 (7th Cir. 1976). See House Report No. 93-1453, supra, 1974 U.S. Code Cong. and Admin. News at 6355. As this Court has held, "[a] trial judge is equally obligated not to recuse himself when the facts do not give fair support to a charge of prejudgment, as he is to excuse himself when the facts warrant such action." United States v. Diorio, 451 F.2d 21, 24 (2nd Cir. 1971), cert. den., 405 U.S. 955 (emphasis original). Accord, e.g., United States v. Tropiano, 418 F.2d 1069, 1077 (2nd Cir. 1969), cert. den., 397 U.S. 1021; Rosen v. Sugarman, 357 F.2d 794, 797 (2nd Cir. 1966).

Here, appellant contends no more than that Judge Elfvin was

United States Attorney during a period when Strike Force Attorneys and the Solicitor General's office discussed whether an appeal would be taken from a dismissal of an unrelated indictment brought against appellant, and when appellant was indicted for unrelated income tax offenses. Appellant, however, does not demonstrate that as a result of this involvement, the court had a special interest in the outcome of the present case. Carried to its logical extreme, such speculation by a defendant would preclude any judge from sitting on a case where he had prior dealings in any official capacity with a defendant, or where he "had expressed an opinion on a general proposition of law." Senate Report No. 93-419, 93 Cong. 1st Sess., p. 2. Such is not the law. See Laird v. Tatum, supra, 409 U.S. at 831-833; United States v. Deardorff, 343 F.Supp. 1045, 1046-1047 (S.D.N.Y. 1971); Senate Report No. 93-419, supra, at 2.[30/]

In the circumstances of the instant case, we therefore submit that Congress did not intend to have Judge Elfvin recuse himself.

30/ Appellant's claim (Lombardo at 26-27) that the bias of the court was maifested by the "harsh sentence" which it imposed, is equally without merit. United States v. Edmonds, 535 F.2d 714, 717 (2nd Cir. 1976); Wolfson v. Palmieri, 396 F.2d 121, 125 (2nd Cir. 1968).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the convictions should be affirmed.

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Western District of New York.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 9th day of June, 1977, copies of the foregoing Brief and accompanying Appendix were served by mail on the following counsel for appellants:

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ADDENDUM

aforesaid five individuals and others as yet unknown, have committed, are committing and are about to commit violations of Sections 1955 (Illegal Gambling Business) and 371 (Conspiracy) of Title 18, United States Code.

(4) From personal participation in the aforesaid investigation and upon review of reports submitted to Your Affiant by other Special Agents of the Federal Bureau of Investigation, Your Affiant is familiar with the following facts and circumstances which are based upon information from personal observation, physical surveillances, checks of official records, prior Court ordered electronic surveillances and a reliable confidential informant.

A. PRIOR ELECTRONIC SURVEILLANCES

(1) On October 31, 1975, the Honorable John T. Elfvin, United States District Court Judge for the Western District of New York, signed an Order pursuant to Sections 2510-2520 of Title 18 of the United States Code, authorizing Special Agents of the Federal Bureau of Investigation to intercept wire communications for a period of 20 days over telephone facilities 716-633-2225 and 716-633-2254, both of which were located at Apartment 6, 291 Palmdale Drive, Amherst, New York. Your Affiant has personally reviewed all of the tapes of intercepted communications produced pursuant to the execution of the aforesaid Order. They disclose that the telephone facilities (716-633-2225 and 716-633-2254) have been used by Joseph A. Lombardo, Donald A. DiCarlo, Richard Kelsey, Jack M. Silverstein, Edward A. Owczarzak and others as yet unknown, for the specific purpose of receiving gambling wagers and disseminating sports betting line information. During the period from October 31, 1975 through November 19, 1975, approximately 1432 telephone calls were intercepted over the above two telephone numbers. Of these calls approximately 644 were for the specific purpose of placing and accepting in excess of approximately $216,995 in gambling wagers on the outcome of various

sporting events; 646 calls were made for the purpose of obtaining the wagering line information or for customers settling up their accounts from previous wagering activities. The two above-mentioned telephones were answered on each occasion by either Richard Kelsey or Jack M. Silverstein. During the aforementioned time period, 93 calls were received over the aforesaid telephone numbers from Joseph A. Lombardo, Donald A. DiCarlo and Edward A. Owczarzak. During these telephone conversations, Joseph A. Lombardo, Donald A. DiCarlo and Edward A. Owczarzak talked with either Richard Kelsey or Jack M. Silverstein and discussed, among other things, the current betting line information on professional sporting events, various customers' wagering accounts and the amount of wagering activities that both offices had received during that respective day. The interception of wire communications over these two above-mentioned telephone facilities was terminated on November 19, 1975.

(2) On December 1, 1975, the Honorable John T. Elfvin, United States District Court Judge for the Western District of New York, signed an Order pursuant to Sections 2510-2520 of Title 18 of the United States Code, authorizing the interception of wire communications for a period of 20 days over the telephone facilities 716-633-2225 and 716-633-2254 located at Apartment 6, 291 Palmdale Drive, Amherst, New York and the telephone facilities 716-688-1279 and 716-688-1602 located at 3 Windham Court, Apartment B, Amherst, New York. Your Affiant has personally reviewed all of the tapes of the intercepted communications produced pursuant to the execution of the aforesaid Order. They disclose that the above-mentioned telephone facilities were used by Joseph A. Lombardo, Donald A. DiCarlo, Richard Kelsey, Edward A. Owczarzak, Jack M. Silverstein and others as yet unknown, for the purpose of receiving gambling wagers and disseminating sports betting line information. During the period from December 1, 1975 through December 11, 1975, approximately 972 telephone calls were intercepted over telephone numbers 716-633-2225 and 716-633-2254. (No communications were intercepted over telephone facilities 716-688-1279 and 716-688-1602). Of

these calls approximately 355 were for the specific purpose of placing and accepting in excess of approximately $121,000 in gambling wagers on the outcome of various sporting events; approximately 541 calls were made for the purpose of obtaining wagering line information and for customers settling up their accounts from previous wagering activities. The telephone facilities bearing numbers 716-633-2225 and 716-633-2254 located at Apartment 6, 291 Palmdale Drive, Amherst, New York, were answered on each occasion by either Richard Kelsey or Jack M. Silverstein. During the aforementioned time period 38 calls were received over the aforesaid telephone numbers from Joseph A. Lombardo, Donald A. DiCarlo and Edward A. Owczarzak. During these telephone conversations Joseph A. Lombardo, Donald A. DiCarlo and Edward A. Owczarzak talked with either Richard Kelsey or Jack M. Silverstein and discussed, among other things, the current betting line information on professional sporting events, various customers' wagering accounts and the amount of wagering activities that both offices had received during that respective day. The Order of December 1, 1975 also authorized the interception of communications over telephone facilities 716-688-1279 and 716-688-1602, both of which were located in the premises at Apartment B, 3 Windham Court, Amherst, New York, however, on December 4, 1975, interception of communications over these two telephone facilities was terminated because investigation by Your Affiant and other Special Agents of the Federal Bureau of Investigation had disclosed that these telephone facilities were no longer being used in the aforesaid illegal gambling business, that the premises was empty and was no longer being occupied by members and co-conspirators of the aforesaid illegal gambling business and that the members of the illegal gambling business had moved this location to an apartment located at Apartment 4, Building F, 4285 Chestnut Ridge Road, Amherst, New York. The interception of wire communications pursuant to this Order on telephone facilities 716-633-2225 and 716-633-2254 was terminated on December 17, 1975.

B. INFORMANT INFORMATION

SOURCE ONE

Your Affiant has received extensive information concerning

LETTER FROM SPECIAL ATTORNEY RICHARD D. ENDLER
TO JUDGE JOHN T. ELFVIN ON POSSIBLE
RECUSAL PROBLEM

UNITED STATES DEPARTMENT OF JUSTICE
ORGANIZED CRIME AND RACKETEERING SECTION
WASHINGTON, D.C. 20530

Address Reply to the
Division Indicated
and Refer to Initials and Number

Buffalo Field Office
921 Genesee Building
Buffalo, New York 14202

RDE:kk

April 5, 1976

Honorable John T. Elfvin
United States District Judge
Western District of New York
Sixth Floor, U.S. Court House
Buffalo, New York 14202

Re: Possible Recusal Problem:
United States v. Joseph A. Lombardo, et al.
CR. NO. 1976-3

Honorable Sir:

Joseph A. Lombardo and four others were indicted on January 7, 1976 and charged with violations of Sections 1955 (Illegal Gambling Business), 371 (Conspiracy) and 2232 (Destruction of Evidence) of Title 18 of the United States Code. In response to the Court's request of March 25, 1976 regarding possible problems of recusal, the following information is submitted.

During late 1970, the Buffalo Field Office of the Federal Bureau of Investigation conducted an investigation of Joseph A. Lombardo, Frank Stasio and Frank Masterana concerning violations of Sections 371 (Conspiracy), 1952 (Interstate Transportation in Aid of Racketeering) and 1084 (Transmission of Wagering Information) of Title 18 of the United States Code. The investigation was based in part upon two Court-authorized wiretaps directed against Lombardo, Stasio, Masterana and others unknown. The Orders authorizing the electronic surveillances were approved on December 3 and 7, 1970, respectively, following application to the Honorable John T. Curtin by Robert C. Stewart, an attorney with the United States Department of Justice, and H. Kenneth Schroeder, former United States Attorney for the Western District of New York.

On December 30, 1970, the Federal Grand Jury for the Western District of New York returned a 13 count indictment charging Lombardo, Stasio and Masterana with violations of 18 U.S.C. 371, 1952 and 1084. The indictment was returned under the auspices of Mr. Schroeder.

The trial of this case (Lombardo I) commenced before the Honorable Chief Judge John O. Henderson on January 4, 1972. Following a four-week trial, the case was submitted to the jury on February 2, 1972. Following two days of deliberations, the jury reported back on February 3, 1972 that they were hopelessly deadlocked. On February 3, 1972, the jury was dismissed and Judge Henderson declared a mistrial. During the trial of this case, Lombardo and Stasio were represented by the late Charles McDonough and Masterana was represented by Mr. Harold Boreanaz. (It is my understanding that Your Honor assumed the offices of the United States Attorney in approximately June of 1972, some five months following the completion of the Lombardo trial.)

On February 25, 1974, the defendants Lombardo and Stasio filed a notice of motion for an Order dismissing the indictment as to all defendants pursuant to Rules 4 and 6 of the United States Court of Appeals (failure of the government to afford the defendants a speedy trial). During the months of March, April and May of 1974, extensive briefing and oral argument were held before Judge John T. Curtin on these motions. On June 28, 1974, Judge John T. Curtin found that the Government had failed to afford the defendants a speedy retrial and, accordingly, dismissed indictment No. 1970-203.

During the months of July and August of 1974, Mr. Robert C. Stewart requested permission to appeal Judge Curtin's Order dismissing the indictment. On August 2, 1974, the Solicitor General of the United States, Mr. Robert Bork, advised that an appeal of Judge Curtin's Order of dismissal was not authorized. These latter communications between Mr. Stewart and the Solicitor General were conducted following consultation with Your Honor who was then the United States Attorney.

The instant case (Lombardo II) arises out of an investigation initiated by the Buffalo Field Office of the Federal Bureau of Investigation in approximately July of 1975, some six months after Your Honor had left the offices of the United States Attorney.

The investigation of the above-entitled case was based in part upon two court-authorized electronic surveillances approved by this Court on October 31, 1975 and December 1, 1975, respectively. The Orders authorizing the electronic surveillances were applied for in both instances by myself and Special Agent John C. Poerstel of the Federal Bureau of Investigation. The applications stated that there was probable cause to believe that Joseph A. Lombardo, Donald A. DiCarlo, Richard Kelsey, Jack M. Silverstein and Edward Owczarzak had committed and were committing violations of Sections 371 (Conspiracy) and 1955 (Illegal Gambling Business) of Title 18 of the United States Code. On January 7, 1976, the Federal Grand Jury returned a three count indictment charging the above-named individuals with violations of those Sections.

The indictment (CR. NO. 1976-3) charges that the above-named defendants conspired continuously between September 1, 1975 and December 20, 1975 to conduct, manage and operate an illegal gambling business. The Government notes that except for Mr. Lombardo, none of the individuals involved in the instant case were involved in the first Lombardo trial back in 1972.

Thus, it appears that Your Honor's only contact with the whole Lombardo matter dating back to late 1970 was a brief span of time during the summer of 1974, while the decision was being made whether to seek an appeal of Judge Curtin's Order of dismissal.

The Government affirmatively states that it does not intend to use any evidence, testimony or documents gathered during the investigation of Lombardo I during its case in chief in Lombardo II. The Government notes, however, the remote possibility that, if Mr. Lombardo should choose to take the stand and testify in his own behalf, certain facts stemming from the 1970 case may be brought out in Court. Since Mr. Lombardo is the only person who is involved in both cases, this problem would not seem to affect the other defendants.

It is the Government's opinion that under the facts and circumstances stated, no conflict of interest exists. In response to the Court's request, I hope that this information has been helpful.

Respectfully,

Richard D. Endler

RICHARD D. ENDLER
Department of Justice Attorney